DONAHUE ELECTRIC, INC.

CONTRACT NO. V593-C-5548-99 **VABCA-6618E**

VA MEDICAL CENTER
LAS VEGAS, NEVADA

Gerald J. Brentnall,Jr., Esq., L.L.P., Loomis, California, for the Applicant.

Anna C. Maddan, Trial Attorney, Moreno Valley, California; ***Charlma J. Quarles, Esq.***, Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE THOMAS

Donahue Electric, Inc. ("Applicant," "Contractor," or "Donahue") seeks $42,111.59 in attorney fees and expenses under the *Equal Access to Justice Act (EAJA)*, 5 U.S.C. § 504, following our decision in ***Donahue Electric, Inc.***, VABCA No. 6618, 03-1 BCA ¶ 32,129, dated December 27, 2002. Familiarity with that decision is presumed. The appeal arose in connection with the Contractor's performance of a contract for re-design and installation of a boiler, sterilizer and medical gas system repair at the VA Medical Center (VAMC), Las Vegas, Nevada. Applicant argued that the specifications were prescriptive and sought additional compensation of $132,704.65 as a result of having to increase the boiler size.

The Appeal was sustained in part and denied in part, and the Applicant was awarded $4,006.31 plus interest for the difference in cost of the larger boiler it furnished.

Eligibility

Donahue asserts that it meets the eligibility requirements of *EAJA* with respect to its being a prevailing party. Its application is timely and contains information supporting its assertions that it meets statutory limitations regarding size, net worth and number of employees. The Government does not contest eligibility.

Prevailing Party

Applicant argues that it prevailed because it achieved some of the benefits it sought in litigation. Applicant prevailed on the issue of whether it was entitled to an equitable adjustment due to its reliance on the original contract 196 lb/hr boiler specification. Applicant also argues that it prevailed on the issue of quantum. Although we found the Applicant entitled to an equitable adjustment for the additional cost of the larger boiler it was required to furnish, the Applicant did not prevail on the issues of additional A/E fees, delay, Desert Plumbing subcontractor costs or the labor, supervision, vehicle or tool allowance costs it allegedly incurred.

Substantial Justification

Fees and expenses shall be awarded "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified." 5 U.S.C. §504(a)(1). The burden is on the Government to show that its position had a reasonable basis in law and fact. The Board must examine the totality of the circumstances. Each determination is made on a case-by-case basis. ***Hopkins Heating & Cooling, Inc.***, VABCA No. 4905E & 4906E, 98-1 BCA ¶ 29,449, *citing* ***Essex Electro Engineers, Inc. v. United States,*** 757 F.2d 247, 252-53 (Fed. Cir. 1985).

The Supreme Court in ***Pierce v. Underwood***, 487 U.S. 552, 565 (1988), explained that a loss on the merits does not equate to an absence of substantial justification of the Government's position. The fact that an Applicant received a judgment far less than it sought does not necessarily create substantial justification. The Court stated that the Government has the burden of establishing that its litigation position was "'justified in substance or in the main', that is, justified to a degree that could satisfy a reasonable person." Determining whether the Government was substantially justified in the positions it took in this appeal is a matter within the discretion of the Board after review of the entirety of the Government's conduct. ***Chiu v. United States***, 948 F.2d 711 (Fed. Cir. 1991); ***Trailboss Enterprises, Inc.***, VABCA No. 5454E *et al.*, 00-1 BCA ¶ 30,800; ***Adams Construction Co., Inc.***, VABCA No. 4669E *et al.*, 98-1 BCA ¶ 29,479.

The Government points to the fact that Applicant prevailed on only the boiler size issue and that it was justified in defending against legally deficient claims of outrageous, unsubstantiated amounts. The Government's litigation position was that the Applicant had total design responsibility and should have ignored the Contract specifications and performed totally independent boiler size determinations of its own. That position was not supported by the unique history of the procurement and the award of only bid alternates. Thus, that position was not substantially justified.

The ADR

The VA argues, supported by an affidavit from its counsel, that there was an alternative dispute resolution (ADR) proceeding conducted immediately before the hearing where an offer of settlement was made that exceeded the amount awarded by the Board. We cannot consider affidavits accompanying

EAJA submissions regarding settlement offers and rejections, because evidence thereof does not appear in the record, as required by 5 U.S.C. ¶ 504(a)(1). As we stated in ***Coffey Construction Co. Inc.***, VABCA No. 3473E, 94-2 BCA ¶ 26,627, at 132,452:

> In that regard, *EAJA* states that "[w]hether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record." To assure that evidence of settlement offers was included in the underlying record for consideration in the event of a later EAJA application, a practice has developed, with the approval of this Board, whereby Government Counsel would file, during litigation, a sealed envelope containing the rejected settlement offer. …This process bears some similarity to *Rule 68 of the Federal Rules of Civil Procedure*, "Offer of Judgment," whereby a defending party may serve upon the adverse party, before trial, an offer of settlement. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. In the notes to the rule, it is stated that this provision is expected to encourage settlements and avoid protracted litigation. The procedure of furnishing a sealed envelope while the matter is being heard on the merits protects the confidentiality of the ADR process and precludes any possible prejudice to either party from the disclosure of the settlement offer to the fact finder. Moreover, it fosters settlement at an early date in the process and prevents ambiguity or later differences as to the nature of the settlement offer, because the parties are forced to put the offer in writing.

The Government did not comply with FRCP 68 nor has it argued that the settlement offer should be considered a special circumstance. The VA is precluded from offering such evidence during this EAJA proceeding.

Fees And Expenses

The Board has discretion to determine a reasonable apportionment of the fees and expenses based on its assessment of the record. *See* ***Hensley v. Eckerhart***, 461 U.S. 424, 440, (1983).

Applicants are expected to document the exact time spent on a case, by whom, their status, and usual billing rates. "Only by knowing the specific task performed can the reasonableness of the number of hours required for any individual item be judged." ***Naporano Iron & Metal Co. v. United States***, 825 F.2d 403, 404 (Fed. Cir. 1987).

Applicant states that it uses a client-billing program called "Timeslips" and its usual rate is $180 an hour. Except for travel, trial and phone conversations, times are rounded down to insure fairness to clients. The Government argues the Applicant's Application is conflicting and confusing, and without merit because the fees and expenses requested are not substantiated and are unreasonable.

The starting point for an *EAJA* claim is receipt of the contracting officer's final decision. ***Levernier Construction Inc. v. United States***, 947 F. 2d 497, 499-501 (Fed. Cir. 1991). The Applicant is not entitled to recover any fees or expenses incurred prior to the receipt of the final decision. Applicant submitted eight separate charges totaling $1,983.50 that were incurred prior to the final decision; that amount will be deducted from the $42,111.59.

VA points out that there are no itemizations of travel expenses or fees and no receipts for hotel, restaurant, or airline tickets. Generally we require receipts. In this application no receipts were provided, however we are aware of the travel and that some expenses were incurred. We have reduced the amounts in the application for travel and food to reasonable amounts. Also, VA states that

charges of $93.75 and $100 to mail documents were excessive as was a charge of $187.50 for "went into town to friend's office to copy documents and." We agree and will deduct $350. Dinner expenses of $164.63, a breakfast of $68.90, and another food charge of $95 will be deducted.

There is no explanation why the Timeslip entry numbers are out of sequence, *i.e*. at the bottom of page 12 of the billing sheets entries start over at #512 dated August 17, 2000. In addition, the entries for November 14, 2001, (#585, 586, 591, page 8) indicate a trip from office to Sacramento airport to Las Vegas and return on that date. Although it was a one-day trip, entries for November 14 on page 14 (584, 587, 588, 589, 590) charge for 2 nights stay ($248) and $199.98 for food. Total charges for November 14 are $3,262.73. $124 for the room and $125 for food will be deducted for those charges.

We deduct a charge of $187.50 for an October 4, 2001 meeting with counsel representing Donahue in another matter. There is no showing that it is related to the appeal in VABCA 6618.

Applicant has cited other matters that it believes the Board should consider and asks us to reward Applicant for its efforts. For example, Applicant spent significant time attempting to arrange an ADR for this appeal. While the excessive nature of the claims and lack of proof may have thwarted such efforts, we believe such efforts should not go unrecognized. Applicant incorrectly states that its Motion for Partial Summary Judgment asked for what the Board ultimately ruled. To the contrary, we specifically found that the specifications were not prescriptive.

Although Applicant has not segregated the fees and expenses related to the different claims considered in this appeal, the Board has discretion to determine a reasonable apportionment of the fees and expenses based on its assessment of the record. When claimed fees cannot be associated with specific

claims, we apply a percentage reduction to reflect the ratio of unsuccessful to successful claims. ***Hensley V. Eckerhart***, 461 U.S. 424, 440, (1983). The Board has determined that after reducing the fess and expenses as explained above ($3,098.53), a percentage of 15% represents the ratio of recovery for the remaining amount ($39,013.06), resulting in an award of $5,851.95.

DECISION

For the foregoing reasons, under the application in VABCA No. 6618E, the Applicant, Donahue Electric, Inc., is awarded fees and expenses under the Equal Access to Justice Act in the amount of $5,851.95.

Date: **August 26, 2003**

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WILLIAM E. THOMAS, JR.
Administrative Judge
Panel Chairman

We Concur:

_____
Richard W. Krempasky
Administrative Judge

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Morris Pullara, Jr.
Administrative Judge